No. 7243

United States Circuit Court of Appeals

For the Ninth Circuit

THE FIRST NATIONAL BANK OF KELSO, WASHINGTON, a Corporation, by E. B. BENN, its Receiver, *Appellant,*

v.

J. G. GRUVER, and THE AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Appellee.*

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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STATE PRINTING PLANT, OLYMPIA, WASH.

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

STATEMENT OF CASE.

As indicated by the Honorable Trial Court in its memorandum decision rendered and filed in this case, there is no substantial dispute between appellant and appellee as to the facts involved in this action. It is to be noted that appellant in its brief assigns no error on the part of the Honorable Trial

Court so far as the facts found are concerned, but contends that on the facts as found by the Trial Court error was committed in its conclusions of law. At all times mentioned in the pleadings in this case and as found by the Trial Court, the appellee Gruver was auditor of Cowlitz county, Washington, and as such county auditor under the statutes of the State of Washington, was charged and required in connection with the performance of his other official duties to receive applications for motor vehicle licenses and to collect the fees provided therefor, and as county auditor under the statutes of the state, was also required to issue hunting and fishing licenses for counties other than Cowlitz county located within the boundaries of the state. The two particular counties involved in this action being the counties of Clark and Skamania.

At the times involved in this action, appellee Gruver, as county auditor, carried two checking accounts in appellant, the First National Bank of Kelso. One of these accounts was denominated as "trust fund," and in this account only moneys received from the issuance of marriage licenses fees were deposited. The other account was denominated "Game Fund," and in this account funds received from hunting and fishing licenses from Cowlitz county were deposited. These two accounts constituted the only accounts so far as the evidence shows which appellee Gruver ever carried in the appellant bank.

The facts, as shown by the evidence and as found by the Honorable Trial Court, further show that for a period of at least six months prior to the closing of the appellant bank, it was the custom of the appellee Gruver as county auditor to make remittances of automobile license fees theretofore collected by him to the state treasurer by drafts drawn by appellant bank on the First National Bank of Seattle, and to make remittances to other counties in the state for hunting and fishing licenses, issued by appellee Gruver for such other counties, which remittances were likewise made by drafts drawn by appellant bank upon other banks. In all instances these drafts were purchased by appellee Gruver as county auditor of Cowlitz county and paid for in silver, currency and checks at the time the same were issued. (T. of R., pages 24, 25 and 26.)

The record shows and the Trial Court found, that on the 9th day of April, 1931, the appellant bank turned over to appellee Gruver certain school warrants of the total face value of $1,503.98. These school warrants thus turned over were identified as to the district number, warrant number and amount of each warrant by a certain written instrument bearing date of April 9, 1931, which written instrument was in part in the words and figures as follows:

"Office of J. G. Gruver, county auditor, court house, Kelso, Washington, April 9, 1931. Received of the First National Bank of Kelso, Washington, as security for Cowlitz County funds deposited by

me and to be deposited by me in such bank, various school district warrants as follows: (Here follows description of warrants). Total $1503.98 (In words and figures). Dated at Kelso, Washington, April 9, 1931. J. G. Gruver, County Auditor." (T. of R., pages 27 and 28.)

The evidence in the case further showed and the Trial Court found that on December 17, 1931, the appellee Gruver purchased from appellant bank a draft on the First National Bank of Seattle in the sum of $10.50 payable to the auditor of Skamania county, Washington, and a similar draft for the sum of $1.50 payable to the auditor of Clark county, Washington. These drafts were paid for in cash by appellee and represented funds received by him as county auditor for hunting and fishing licenses issued by him as county auditor of Cowlitz county for Skamania and Clark counties respectively. The evidence in the case further shows and the trial court found that on December 21, 1931, the appellee Gruver had on hand as county auditor the sum of $833 in the form of silver, currency and checks which had been received by him as county auditor in payment of automobile license fees issued for the State of Washington, and on that day he purchased from appellant bank two drafts drawn on the First National Bank of Seattle and payable to the treasurer of the State of Washington, one being in the sum of $533 and the other in the sum of $300. These drafts were paid for by appellee Gruver with cash, currency and checks which he had collected upon the

issuance of same. At the time these several drafts were issued, the appellant bank had sufficient funds or credit in the First National Bank of Seattle to pay the same upon presentation, and the same would have been paid had it not been for the closing of appellant bank prior to the time the drafts were presented for payment.

The evidence shows and the Trial Court found, that the last date on which appellant bank did business was December 22, 1931, and that the Comptroller of Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation. At the time of the closing of appellant bank, appellee Gruver had on deposit in the bank in the trust fund account and in the game fund account, a total balance of $57.71 together with accrued interest thereon amounting in all to seventy cents making a total of $58.41.

After the closing of appellant bank and on or about the 28th day of December, 1931, the record shows that appellee Gruver sold the school warrants which had been deposited with him and received in payment therefor the sum of $1,568.59. That from the sum thus received, the appellee deducted the amount represented by the balance of his deposit in the trust fund and game fund together with the amount of the drafts theretofore purchased, and tendered the balance amounting to the sum of $680.38

to the examiner in charge of appellant bank. This tender was refused by the examiner and demand was made upon the appellee Gruver for the sum of $1510.18, the same being the balance of the proceeds of said warrants after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of the bank. By stipulation, the sum of $680.38 tendered by appellee Gruver was paid to the examiner in charge of the appellant bank, it being agreed, however, that the acceptance of same should not prejudice the appellant's right to recover any additional sum which the court might find owing to appellant.

ARGUMENT.

The first assignment of error and the first question discussed by appellant in its brief is that the Trial Court erred in holding that appellee Gruver at the time he collected and received the fees for automobile licenses was acting as an officer and agent of Cowlitz county, Washington, and that at the time he collected and received the fees for hunting and fishing licenses for Clark and Skamania counties, and that such fees constituted Cowlitz county funds. In other words, the question is, were the funds used by appellee Gruver in the purchasing of the several drafts "Cowlitz County funds," so that appellee Gruver was protected by the pledge of the school warrants turned over to him by the appellant bank as and for security. We think that in the discussion of this phase of the case as indicated in appellant's brief, appellant has lost sight of the real issue in the case. This is not a contest waged as between the State of Washington and appellee Gruver or the counties of Skamania and Clark against appellee Gruver to determine the character of these particular funds, but it is a case waged as between the receiver of appellant bank and appellee Gruver as to the character and status of these particular funds. As indicated by the memorandum decision of the Honorable Trial Court, while appellee Gruver as auditor of Cowlitz county may have been in one sense the agent of the state and of the counties of Clark and

Skamania in the matter of collecting these funds, he was also the agent of Cowlitz county.

That while as between Cowlitz county and the State of Washington or between Cowlitz county and the counties of Clark and Skamania, the funds in question belonged to the state and to the counties of Clark and Skamania, as between Cowlitz county and appellant bank at the time they were received by the bank, they were funds of Cowlitz county. At this point, we wish to call the Court's attention to the finding of fact number nine made by the Honorable Trial Court, and to which finding of fact no error is assigned by appellant in this case, which reads:

> "It being agreed by and between said plaintiff bank and said defendant Gruver that such warrants were to protect all funds coming into his hands as county auditor and deposited by him in said bank as such auditor."

The evidence in the case given by the appellee Gruver fully justified the Trial Court in making this finding, and we think and contend that it was the intent and purpose of all parties at the time of the delivery by appellant bank to appellee Gruver of the school district warrants as evidenced by the receipt bearing date of April 9, 1931, to protect and secure appellee Gruver as county auditor for all funds deposited by him as auditor in the appellant bank.

If this be true, and the Honorable Trial Court found it to be a fact, then it is quite beside the case to determine whether strictly speaking the funds

were Cowlitz county funds or not. To give this written receipt the strict construction contended for by appellant in this case, would, we think, defeat the very purpose for which it was given.

The Supreme Court of the State of Washington in the case of *State ex rel. Port of Seattle v. Gaines,* 109 Wash. 196, discusses at some length what is meant by the term "county moneys" as that term is used in connection with depositaries for county funds. In the course of its opinion, the Supreme Court of the State of Washington said:

"We think the legislature used the words 'county moneys in his hands or under his official control' in the sense that any public moneys required to be held by the county treasurer become, for the purpose of keeping and handling the same, moneys of the county, and that such words had reference to any public moneys for which the county and its officials are by law responsible."

Under the law of the State of Washington it was clearly the official duty of appellee Gruver as county auditor of Cowlitz county to receive applications for motor vehicle licenses and to collect the statutory fee therefor. There is no dispute on this point between appellant and appellee in this case. It was equally the duty of the appellee Gruver as auditor of Cowlitz county to issue fishing and hunting licenses for other counties within the state and to collect the fees therefor. There is no dispute between appellant and appellee on this point. And we contend that under the logic of the holding of the

Supreme Court of the State of Washington in the *Gaines* case *supra,* Cowlitz county and appellee Gruver as auditor thereof, being responsible therefor, such moneys became, for the purpose of keeping and handling same, the moneys of Cowlitz county, and as such were within the protection of the security given by appellant bank in the form of the school warrants deposited with him under date of April 9, 1931. It may be admitted on all hands, we think, that a county is a municipal corporation and an agent of the state. *(Constitution of the State of Washington, Art. 11, sec. 4-12 inclusive.) Lincoln County v. Brock,* 37 Wash. p. 14. *Art. 11, sec. 5, of the Constitution of the State of Washington* provides in part as follows:

> "And it (state legislature) shall provide for the strict accountability of such officers for all fees which may be collected by them and for all public moneys which may be paid to them, or officially come into their possession."

There can be no question in this case and we think no contention is made, but that the moneys paid to appellee Gruver as county auditor and involved in this case were received by him in his official capacity and no contention is made but that such moneys constituted public moneys.

Under the provisions of sec. 9930, Rem. Comp. Stat., of the State of Washington, official bonds of all county officers run to the state. And so we say, as was held by the Honorable Trial Court in this

case, that these funds in dispute constituted county funds as between the appellant bank and appellee Gruver as county auditor, and he as county auditor and Cowlitz county being responsible therefor, we say, as the Supreme Court of the State of Washington said in the *Gaines* case *supra,* that these funds having come into the hands of the appellee Gruver as county auditor lawfully, and being public moneys, that for the purpose of keeping and handling the same, they became moneys of Cowlitz county.

Did the Drafts Purchased by Appellee Gruver Constitute a Deposit in Appellant Bank?

On this phase of the case, the Honorable Trial Court in its memorandum decision held that while

> "It may be conceded that were the transaction one between the bank and the ordinary bank customer with a checking account therein it would not, under the circumstances, be a deposit, but in view of the strict accountability to which county officers are held in handling public money and particularly in view of the constitutional provisions above quoted, these funds were 'deposited with the bank.' Upon their delivery by the auditor to the bank, title passed to the bank and the bank became the debtor in case of non-payment of the bank, a debtor subject to suit either by the county or its auditor when paid by them. Such drafts in so far as effect and principle are concerned, were not essentially different from demand certificates of deposit."

The Trial Court cited the case of *Reynes v. Dumont,* 130 U. S. p. 354, as authority sustaining the court's view of this phase of the case. At page

28 of appellant's brief, counsel for appellant state: "A deposit creates the relation of debtor and creditor between the bank and depositor." We concede that this is sound law. It is equally sound law that the purchase of a bank draft creates the relation of debtor and creditor between the bank and the purchaser.

Morse on Banks and Banking, Vol. 3, p. 316;
Leach v. City Commercial Savings Bank of Mason City, 212 N. W. p. 746.
Standard Oil Co. v. Veigel, 219 N. W. p. 863;
Leach v. Battle Creek Savings Bank, 211 N. W. p. 527;
Spiroplos v. Scandinavian-American Bank, 116 Wash. p. 491, 16 A. L. R. p. 181.

In the *Scandinavian-American Bank* case *supra,* which seems to be a leading case on this subject, the Supreme Court of the State of Washington cited with approval the case of *Jewett v. Yardley,* 81 Fed. p. 920, wherein it was held that the relation between the bank and the holder of drafts issued by it was that of debtor and creditor, and the Supreme Court of the State of Washington specifically held in the *Scandinavian-American Bank* case *supra,* "that the relation between Spiroplos and the Scandinavian-American Bank, after the transaction of the purchase of the drafts, was that of debtor and creditor."

So it would seem in this case, that there can be no escape from the legal conclusion under the facts in the case, that the purchase of the drafts by ap-

pellee Gruver as county auditor from the appellant bank created as between Gruver and the bank the relationship of debtor and creditor, and that the drafts being purchased with Cowlitz county funds, these funds were, as held by the Trial Court, deposited with the bank and were protected to the same extent by virtue of the school warrants which had theretofore been turned over by the appellant bank to appellee Gruver to secure deposits of county funds as were any moneys actually on deposit in such funds at the time the bank was taken over by the Comptroller of Currency for liquidation.

Would Appellee Gruver Be Entitled to Plead and Recover in this Action the Amount Paid for the Drafts on the Theory of Set-off and Counterclaim?

The Honorable Trial Court having concluded in its memorandum decision that the drafts in question were purchased with Cowlitz county funds and that such drafts constituted deposits in appellant bank held that: "Discussion of other questions argued is not necessary." Counsel for appellant, however, devotes considerable space in his brief to the discussion of this phase of the case. Under the facts as found by the Trial Court, the claim of appellee Gruver undoubtedly, in any event, would constitute a preferred claim against the assets of appellant bank, it being admitted that Gruver had theretofore paid the state and the counties of Clark and Ska-

mania the several sums represented by the several drafts. We think this phase of the case is controlled by the express provision of the statutes of the State of Washington.

Section 265, Rem. Comp. Stat. of the State of Washington, reads as follows:

"The counterclaim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

"2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

Section 266, Rem. Comp. Stat., of the State of Washington, reads as follows:

"The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was

originally liable, or such assignee while the contract belonged to him."

Both of these demands arise out of the same transaction and both arise on contract, either expressed or implied and both existed at the time of the commencement of this action. It is well settled that a set-off may be pleaded as a defense to an action brought to the United States Courts in any state where that plea is permissible by the laws of the state.

> *Frick, et al. v. Clements, et al.*, 31 Fed. 542;
> *Charnney v. Sidley*, 73 Fed. 980;
> *Dotson v. Kirk*, 180 Fed. 14;
> *Payne v. Clark*, 271 Fed. 525;
> *Woodlawn Farm Dairy Co. v. Erie R. R. Co.*, 282 Fed. 278;
> *Longsdorf Cyclopedia of Federal Procedure*, Vol. 2, page 597.

We respectfully submit that under the facts as found by the Honorable Trial Court, which are not disputed, that the funds used by appellee Gruver in purchasing the drafts payable to the treasurer of the State of Washington and to the auditors of Clark and Skamania counties were Cowlitz county funds and therefore secured by the pledged school warrants and that the purchase of such drafts by the appellee Gruver constituted a deposit in appellant bank and that the sums paid therefor were secured by the pledged property.

Under the admitted facts in this case, we respectfully submit that in any event appellee Gruver would be entitled to plead and recover the amount paid for such drafts upon their being dishonored by way of set-off and counterclaim, and that the judgment of the Honorable Trial Court should in all things be affirmed.

Respectfully submitted,

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